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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

SARAH MEISTER, Plaintiff and Appellant, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Defendants and Respondents.	A110883 (Alameda County Super. Ct. No. RG03110010

Plaintiff Sarah Meister seeks reversal of the trial court's grant of summary judgment in favor of defendant the San Francisco Jewish Film Festival. We affirm the trial court's judgment.

BACKGROUND

Meister sued the Jewish Film Festival and the Regents of the University of California for general negligence and premises liability, contending she had broken her patella when she slipped on some liquid in the basement of Wheeler Hall, an incident described further below. The trial court granted the Regents' motion for summary judgment on January 24, 2005, finding that Meister did not establish evidence of constructive notice required by Government Code section 835, et seq. That ruling was not appealed.

Defendant subsequently moved for summary judgment, arguing that it did not rent or control the basement hallway area where Meister had slipped and fallen and, if it did, that it lacked actual or constructive notice of the liquid spill.

The relevant undisputed facts discussed in the summary judgment motion below are as follows. Approximately 9:00 p.m. on August 3, 2002, Meister arrived at the University of California's Wheeler Hall to view a film that defendant was showing in Wheeler Auditorium as a part of its annual film festival. Wheeler Hall is a large building on the campus of the University of California at Berkeley with numerous classrooms in addition to Wheeler Auditorium, which is located on the Hall's first floor. Defendant was showing films in Wheeler Auditorium from August 3 through August 8, 2002.

Meister claimed that, prior to the movie's showing, she went in search of a restroom, and that she was directed by defendant's staff to use the basement-level restrooms (defendant disputes that anyone directed Meister to the basement). As she was walking down the basement hallway to the restroom, Meister slipped and fell. She claimed that she slipped on a puddle of clear liquid, probably soda, approximately four to five inches in diameter. Meister did not know how the puddle got on the floor, how long the puddle was on the floor, what the exact substance of the liquid was, or who, if anyone, spilled the liquid. Meister claimed that she severely fractured her patella.

Arrangements for the use of Wheeler Auditorium for the film festival were made through a campus sponsor, the Center for Middle Eastern Studies (Center). The Center submitted in July 2002 to Cal Performances, which manages Wheeler Auditorium on behalf of the University of California at Berkeley for such events, a "Reservation Request Form" to reserve Wheeler Auditorium for the showing of Jewish films by defendant. Cal Performances filled in the cost estimate section of the Reservation Request Form, which included the cost of the rental of Wheeler Auditorium, as well as various other charges associated with the use of such facility, including charges for custodial services to be performed by the University of California.

There were no prior reports or complaints about liquid on the basement floor and defendant had no actual notice of it. The only policing and pick-up done by defendant was inside Wheeler Auditorium between the showing of films each day of the event. There was, however, a house manager for Cal Performances who acted as a liaison between Cal Performances and defendant, for whose services defendant was also

charged. This house manager frequently visited the basement area and checked it for cleanliness throughout the film event on the day of the incident. She stated in a declaration submitted in support of defendant's summary judgment motion:

"On the day of August 3, 2002, I made frequent trips to the basement of Wheeler Hall, directed and showed guests to the restroom in the basement, used the basement restroom myself, and checked the restroom and basement hallway for cleanliness throughout the event. I do not recall seeing any liquid on the floor of the basement hallway at anytime [*sic*] on August 3, 2002, either before or after Ms. Mesiter's [*sic*] fall."

The house manager kept a detailed report documenting any significant occurrences while she was on duty on August 3, 2002. Although the house manager made a note of Meister's fall in her report, she did not make any note of any report of liquid on the floor prior to the incident.

Defendant did not know of anyone who had been injured or slipped as a result of the liquid that Meister claimed she slipped on in the basement hallway of Wheeler Hall, nor did defendant know of anyone else who had ever slipped and fallen at Wheeler Hall before August 3, 2002.

The trial court granted defendant's motion for summary judgment because it concluded that defendant had no actual or constructive notice of the spill. The court found that Meister had failed to present evidence regarding the particular length of time the liquid substance had been on the floor prior to Meister's slip and fall, and that the possession and control issue was moot. Meister subsequently filed a timely notice of appeal.

DISCUSSION

Meister contends the trial court erred in granting summary judgment, arguing in effect that whether defendant had constructive notice of the liquid spill was an issue of fact for the jury to determine. We disagree. Defendant made a prima facie showing that Meister could not establish constructive notice of the spill, to which Meister failed to raise a triable issue of material fact. Accordingly, we affirm the trial court's ruling.

The trial court's summary judgment rulings are subject to our de novo review. (*Scheiding v. Dinwiddie Construction Co*. (1999) 69 Cal.App.4th 64, 69 (*Scheiding*).) "In performing our de novo review, we must view the evidence in a light favorable to plaintiff as the losing party [citation], liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor. [Citations.]" (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 768-769.)

As this court has previously discussed in *Scheiding, supra*, 69 Cal.App.4th at p. 69, "[a] motion for summary judgment must be granted if all of the papers submitted show 'there is no triable issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law. In determining whether the papers show . . . there is no triable issue as to any material fact the court shall consider all of the evidence set forth in the papers, . . . and all inferences reasonably deducible from the evidence . . . .' (§ 437c, subd. (c).) A defendant has met its burden of showing a cause of action has no merit if it 'has shown that one or more elements of the cause of action . . . cannot be established, or that there is a complete defense to that cause of action. . . .' "

As our Supreme Court has noted, "[s]ummary judgment law in this state . . . continues to require a defendant moving for summary judgment to present evidence, and not simply point out, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Aguilar*), accord, *Saelzler v. Advanced Group 400*, *supra*, 25 Cal.4th at p. 768 [burden shifts to the opposing party "upon a 'showing' that one or more elements of the cause of action cannot be established"].) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Aguilar, supra*, 25 Cal.4th at p. 850, fn. omitted.) Thus, "the party moving for summary judgment bears an initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact; if he carries his burden of production, he causes a shift, and the opposing party is then subjected to a burden of production of his

own to make a prima facie showing of the existence of a triable issue of material fact." (*Ibid*.) "A prima facie showing is one that is sufficient to support the position of the party in question." (*Id.* at p. 851.)

Where, as here, it is argued that an owner/occupier's failure to correct a dangerous condition is the basis for liability, the plaintiff is burdened with showing that the defendant had notice of the dangerous condition with a sufficient time to correct it. (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1206 (*Ortega*).)[1] However, the plaintiff is not required to prove that the defendant had actual notice of the condition, nor must the plaintiff produce direct evidence of the length of time the condition existed prior to the fall. (*Id.* at 1212-1213.) Rather, "evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it." (*Id*. at p. 1203) Thus, even where the plaintiff has no evidence of the source of the condition or the length of time it existed, "evidence of the owner's failure to inspect the premises within a reasonable period of time is sufficient to allow an inference that the condition was on the floor long enough to give the owner the opportunity to discover and remedy it." (*Ibid*.)

In *Ortega*, *supra*, 26 Cal.4th 1200, the plaintiff was shopping in a Kmart store when he slipped on a puddle of milk on the floor adjacent to a refrigerator and injured his knee. (*Id*. at p. 1204.) Plaintiff had no evidence showing how long the milk had been on the floor. Instead, he claimed that because the evidence showed Kmart had not inspected the premises in a reasonable period of time prior to the accident, a jury could infer the puddle was on the floor long enough for Kmart employees to have discovered and

[1] Our ruling centers on the issue of constructive notice, as does the parties' arguments to us and the trial court's ruling below. Like the trial court, we consider the issue of whether defendant had possession and control of the basement hallway to be moot in light of our holding. Accordingly, we do not address the issue. Similarly, since we find that the undisputed facts show no constructive notice here pursuant to *Ortega v. Kmart Corp., supra,* 26 Cal.4th 1200, we do not address defendant's argument that *Ortega*'s holding should be restricted to retail businesses.

remedied it. (*Ibid*.) Kmart's former store manager testified that although the store kept no written records, all employees were trained to look for and clean up any spills or hazards, that several employees worked in the pantry aisles next to the milk refrigerator, and that every 15 to 30 minutes an employee usually walked the aisle where plaintiff slipped. (*Ibid*.) However, when asked whether the milk could have been on the floor for five minutes or two hours, the manager acknowledged that the milk could have been on the floor for as long as two hours. He also testified that on the day of the accident, management would not have any idea if the aisle where the accident occurred was inspected at any time during that day. (*Ibid*.)

The jury returned a verdict in plaintiff's favor, which the Court of Appeal affirmed. (*Ortega*, *supra*, 26 Cal.4th at p. 1204.) The court affirmed the appellate court's judgment in light of the evidence that Kmart had failed to inspect the premises within a reasonable period of time prior to the accident, given its manager's testimony that the spill could have been on the floor for up to two hours. (*Id*. at pp. 1207, 1213.)

Here, the parties do not dispute that defendant had no actual notice of the spill, or of anyone ever slipping and falling in the basement of Wheeler Hall. Nonetheless, Meister insists that *Ortega*, *supra*, 26 Cal.4th 1200, requires that we reverse the trial court's ruling because, in light of defendant's inadequate inspection protocol, there was a triable issue of fact as to whether it had constructive notice of the spill. This is not correct for a simple reason. Unlike Kmart in *Ortega*, which acknowledged that it had no proof that anyone had actually inspected the area of the milk spill that day and that the spill could have been on the floor for up to two hours, defendant established that a responsible person had inspected the basement hallway where Meister slipped and fell. It was undisputed that Cal Performance's house manager, acting as a "liaison" to defendant, was responsible for policing that basement hallway, and had on the day of Meister's fall made "*frequent*" trips there, and "checked . . . the basement hallway for cleanliness *throughout* the event." (Italics added.) Although the house manager's description of her activities was brief, her references to "frequent" visits and to checks "throughout" the

event were sufficient for defendant to meet its initial burden of making a prima facie showing that there was no triable issue of material fact regarding causation.

Meister contends these statements are too "vague" to draw the inference that the house manager inspected the area in a manner consistent with reasonable care prior to Meister's fall. We disagree, particularly in light of plaintiff's overall burden of proof with regard to causation. As *Ortega, supra*, 26 Cal.4th at p. 1205 instructs, issues of causation are factual questions for the jury to decide "except in cases in which the facts as to causation are undisputed. [¶] . . . [¶] 'A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant.' " (*Id*. at pp. 1205-1206.) We think it impossible to reasonably conclude that the house manager's statement indicated anything other than the exercise of reasonable care here.

Once defendant made this prima facie case, the burden shifted to Meister to show the existence of a triable issue of material fact regarding causation (*Aguilar v. Atlantic Richfield Co., supra*, 25 Cal.4th at p. 850), which in this case meant raising factual issues regarding the house manager's inspections. However, Meister, although she received the house manager's declaration approximately two and a half months before the hearing on defendant's motion for summary judgment, failed to depose the house manager or produce any evidence otherwise that contradicted the house manager's recollections. Thus, Meister failed to meet her burden of production in opposing defendant's summary judgment motion, and the trial court properly granted summary judgment.

Meister makes a number of other arguments for reversal here. First, Meister contends the trial court misconstrued *Ortega* by basing its ruling "entirely" on its determination that Meister offered no evidence that the "spill was there for a particular length of time, much less for up to two hours." We read the portion of the trial court's ruling referred to by Meister as merely summarizing its view that Meister had failed to offer any evidence of actual *or constructive* notice. Meister ignores that the trial court made clear at the summary judgment motion hearing that it was also relying on the house

manager's undisputed recollection of her frequent visits to the basement on the day of the incident. Regardless, we have established in our own de novo review that there is a basis in law for affirming the trial court's grant for summary judgment. (See, e.g., *Farron v. City and County of San Francisco* (1989) 216 Cal.App.3d 1071, 1074 [summary judgment must be upheld if it is correct pursuant to any theory, whether or not the trial court's theory was correct].)

Meister next contends defendant's "inspection protocol" was inadequate, contending, as it did in its opposition below, that the only "formal cleaning" of the hallway area was by the custodial staff the night before, and that defendant did not require its own staff or volunteers to clean or inspect the hallway during festival hours. Meister concludes that "while Wheeler Hall was essentially operating daily as a movie theater selling concessions to thousands of Bay Area patrons, not one person associated with [defendant] took measures to ensure the safety of those patrons from slipping on spilled liquids upon smooth floors during festival hours."

Meister's argument fails in light of the house manager's declaration. Meister, arguing that the court gave undue deference to the declaration, mischaracterizes it, contending that "all [it] demonstrates is that . . . someone affiliated with [defendant] did something, i.e., someone charged with the care of Film Festival patrons actually went to the area where this fall occurred." To the contrary, the house manager plainly stated that she made "frequent" trips to the basement and "checked" the hallway "throughout" the day for cleanliness.

Finally, Meister contends the trial court improperly weighed the house manager's declaration against the evidence that defendant failed to perform reasonable inspections. The record does not support Meister's argument. Indeed, the house manager's statement of her actions showed that defendant had conducted reasonable inspections. Meister's failure to present evidence to dispute this evidence was fatal.

DISPOSITION

The judgment is affirmed. Defendant is awarded costs.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.